

### Michigan Supreme Court Guardianship Task Force

The Wayne County Probate Court appointed a receiver, John M. Chase Jr. to attempt recovery of assets. His extensive and painstaking Preliminary Report documented substantial misfeasance, malfeasance, and non-feasance in compelling detail. The FBI investigated. The federal prosecutor convened a grand jury. The state attorney general promised action. The Representative Assembly of the State Bar passed a strongly-worded resolution by the Elder Law & Advocacy Section calling for a look at potential abuse of guardianship throughout the state.

The Michigan Supreme Court answered the State Bar resolution by convening a 24 member Guardianship Task Force, with a mission to examine how the judiciary, legislature, and executive branch agencies could better protect the interests of individuals for whom guardianship or conservatorship was brought. Members included legislators, judges, court staff, representatives of social services and mental health agencies, advocacy organizations for older adults and for individuals with developmental disabilities, gerontologists, attorneys, and the public, including five members of the Elder Law & Advocacy Section.

The Task Force created four committees, each to make recommendations to effect one of the following goals:

- o Reduce the Use of Guardianships and Conservatorships.
- o Obtain Adequate Numbers of Qualified and Concerned Guardians.
- o Monitor Guardians and Court Operations.
- o Develop Standards, Training, and Education for Guardians.

Review of available data, including the results of a survey of court practices conducted by the Task Force, revealed widely varying rates of guardianship among counties, non-compliance by some courts as to the required reviews, different methods of court review of annual reports and annual accountings, reluctance of some courts to use all available follow-up procedures on delinquent accounts, divergence on the qualifications and role of the GAL, and in requirements for additional documentation such as medical or other evaluations.

A second survey, of petitioners filing for guardianship, indicated that many were requested to do so by hospitals, nursing homes, and financial institutions as a condition of the individual being admitted or treated or receiving benefits. Even persons who had executed a durable power of attorney or other advance directive while competent were required to be under guardianship.

The Task Force unanimously approved eleven recommendations of three different types.

Recommendations on how to reduce unnecessary petitions for guardianships and conservatorships.

RECOMMENDATION 1: Each county should establish a local resource for citizens to help assess the need for guardianships and conservatorships, to share resources, to resolve issues outside the probate system, and to assist in developing alternatives to guardianships and conservatorships.

RECOMMENDATION 2: Existing statutory provisions for medical treatment decisions are inadequate or not recognized by many, and therefore, legislation should be explored.

### Epic Effort Yields New Probate Code

*Brad Geller*

The legislature has enacted SB 209, the Estates and Protected Individuals Code (EPIC). The Code will replace the entire Revised Probate Code on April 1, 2000. The final, 389-page bill, was the result of prodigious work by the Probate and Estate Planning Section, legislators on the House Judiciary Sub-Committee, legislative staff, the banking and insurance industry, and advocacy organizations. The Elder Law and Advocacy Section played an active role with the goal of ensuring the bill furthered the interests of "consumers" in decedent estates, and well protected respondents in guardianship and conservatorship proceedings.

As enacted, the bill is an amalgam of the Uniform Probate Code, Michigan Revised Probate Code and suggested improvements to both those acts. A few of the changes to current law relative to decedent estates are:

- o Adoption of prudent investor rule;
- o Substantial increase in spousal share in intestate succession and elective share;
- o Personal representative may take periodic fees without prior court approval;
- o Notice required to interested parties so they can object to costs of administration; Account must specifically state amount of attorney and fiduciary fees;
- o Attorneys serving as personal representative must keep time records; and
- o Affidavit delivered to bank or broker as alternative to small estate proceeding for personal property valued at no more than \$15,000.

Significant changes were made to adult guardianship and conservatorship proceedings. Some of these are highlighted below.

- o Recognizing many litigants are not represented by counsel, the legislature explicitly provided court staff can offer interested persons general information, blank forms, and specific information concerning the preparation of a form.
- o When meaningful communication is possible, a guardian should consult with the individual before making a major decision.
- o If a guardian delegates his or her powers through a power of attorney, the guardian must inform the court within 7 days, and provide the name, address and telephone number of the attorney-in-fact.
- o The need for a conservator must be established by clear and convincing evidence.
- o In general, the procedural protections in guardianship proceedings apply to conservatorship, e.g. right to independent exam, closed hearing, moving site of hearing, trial by jury.
- o Provision for limited conservatorships; court must fashion conservator's powers to the demonstrated needs of the individual.
- o Conservator must take into account the existing estate plan of the individual in carrying out conservator's duties.
- o Upon death of individual, conservator may petition to be given powers of personal representative, should no one else petition.

The legislation will necessitate changes to court rules and court forms;. Information will be provided to members as it becomes available.

As a service to its membership, the Elder Law and Advocacy Section is making available copies of EPIC. To order a copy, please use the order form on page 6 of this issue. Order Senate Bill 209.

## **Michigan Supreme Court Guardianship Task Force Continued**

RECOMMENDATION 3: A broad education effort emphasizing the presumption of competency and alternatives to guardianship should be targeted particularly at hospitals, nursing homes, and other medical or psychological personnel.

RECOMMENDATION 4: Statutes and court rules should be changed so as to clarify that decisions of patient advocates have priority over all other substitute decision makers.

Recommendations to reduce granting of inappropriate petitions once filed

RECOMMENDATION 5: Probate Court forms used for petitioning the court for, and ordering the appointment of, a guardian or conservator should be amended so as to provide for, respectively, more screening information and separate findings on functional capacity and the necessity for the appointment.

RECOMMENDATION 6: Guardians ad litem should include information evaluating functional capacity in their investigations and reports to the court, and should recommend the use of mediation services to resolve disputes which may come up over the terms of a prospective guardianship.

RECOMMENDATION 7: Judges should have their initial mandatory training supplemented with instruction on cognitive and physical impairments, mental illness, and the aging process, and should periodically be required to receive subsequent training which both refreshes old standards and introduces new issues.

Recommendations on how better to manage guardianships and conservatorships

RECOMMENDATION 8: Minimum ethical standards for professional guardians and professional conservators should be promulgated and enforced.

RECOMMENDATION 9: Those courts failing to follow statutory and court rule requirements should be compelled by the Supreme Court to comply.

RECOMMENDATION 10: Statutes, court rules, forms, and practice should be changed so as to require the court to review the annual accountings of guardians and conservators, order bonds or restrictions in relation to property and estates, and confirm both the decision to sell real estate and the sale price.

RECOMMENDATION 11: Courts should increase the recruitment and training of volunteer guardians, and more guardians who are state-agency-funded and -monitored should be provided as guardians of last resort.

The Task Force report has been distributed by the Michigan Supreme Court to all legislators, the Governor, and all probate judges. As noted elsewhere in this newsletter, legislators have already introduced a package of bills designed to implement some of the recommendations, and these bills are expected to be taken up in the lame duck legislative session following the November elections. Further information will be forthcoming on what actions the Governor and his executive branch agencies as well as the Supreme Court, itself, is prepared to take to enact those recommendations applicable to their respective branches of government.

Copies of the Final Report and all committee recommendations are available via the order form on page 6. Order the Guardianship Reform Briefing Book.

## **Michigan Long Term Care Companion Now Available**

Citizens for Better Care has revised its 1994 Michigan Long Term Care Reader with up-to-date information on Medicaid, Medicare, how to choose nursing homes and other long term care services.. This book is a wonderful help in navigating the long term care system in Michigan.